

There will be judgment for the plaintiff in the sum of \$20,000 for the general damages and \$2,855.40 for the special damages and costs.

Judgment for the plaintiff.

Solicitors: P. G. Lim & Co.; Chooi & Co.

HASSAN v. ISMAIL

[F.C. (Azmi L.P., Suffian & Ali FJJ) January 9, 1970]

[Kuala Trengganu — Federal Court Civil Appeal No. X.14 of 1968]

Contract — Specific performance — Sale of land subject to subdivision — Reasonable time to apply for subdivision — Whether contract void ab initio or being contrary to Land Enactment or National Land Code — Contracts (Malay States) Ordinance, 1950, s. 47 — Specific Relief (Malay States) Ordinance, 1950, s. 19.

Land Laws — Subdivision of land — Prohibition under Kelantan Land Enactment and National Land Code — Exemptions.

The appellant had agreed to sell a portion of a piece of land to the respondent, the appellant undertaking to execute the transfer "as soon as the land is subdivided by the Government". It was also agreed that if the appellant refused to transfer the land after it had been subdivided he was to refund the money, three times the amount of the purchase price. The appellant did not apply for subdivision of the land and the respondent applied for specific performance of the contract. The appellant offered to refund three times the amount of the purchase price. The learned trial judge made an order for specific performance holding (a) the engagement to apply for subdivision must be performed within a reasonable time and considering the time lapse the appellant had failed to do so and (b) the agreement to transfer might be specifically expressed despite the appellant's willingness to make the penalty payment provided. On appeal it was argued that the contract was void *ab initio* as the subdivision was forbidden under the Kelantan Land Enactment and the National Land Code.

Held, dismissing the appeal (Ali F.J. dissenting): (1) although the subdivision was forbidden under the Kelantan Land Enactment and the National Land Code there was provision for exemption under the enactments and therefore the contract was not *ab initio*;

(2) in the circumstances the appeal must be dismissed and an order made for the appellant to submit an application for subdivision to the Land Office within two weeks of the judgment of the court.

Case referred to:

(1) *Savage & Ors. v. Uwechia* [1961] 1 All E.R. 830.

The following cases were also cited in argument: *Pelepah Valley (Johore) Rubber Estates Ltd. v. Sungai Besi Mines* [1954] M.L.J. 241; *Mohamed Abdullah v. Teoh Teng Swee* [1953] M.L.J. 138; *Satyabrata Ghose v. Mugneeram Bangur & Co. and Anor.* [1954] S.C.R. 310.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse for the appellant.

C. Jegathesan for the respondent.

Cur. Adv. Vult.

Suffian F.J.: Hassan bin Taib, the defendant in the lower court and appellant before us, had a piece of

A land, Lot 31, in Mukim Ketherah East, Daerah Pangkal Kalong, in Kelantan. It appears that Ismail bin Ibrahim, the plaintiff in the lower court and respondent before us, was married to the defendant's niece and lived in a house on the defendant's land. On 3rd December, 1962, the defendant sold a portion of the land 60 feet wide and 70 feet long to the plaintiff for \$400; it appears that on that portion stood the plaintiff's house. The same day they executed an agreement (Exhibit P1) whereby —

- (1) the defendant acknowledged receipt of the purchase price,
- (2) the defendant undertook to execute a transfer to the plaintiff "as soon as the land is subdivided by the Government" and
- (3) should the defendant refuse to transfer the land to the plaintiff after it had been subdivided by the Government, the defendant undertook to "refund the money three times the amount [of the purchase price] totalling \$1,200".

D That was all there was concerning subdivision and transfer. The defendant also undertook to allow the plaintiff to erect a building on the land without payment and to occupy the land free of charge. The defendant failed to subdivide the land and transfer the portion to the plaintiff. The plaintiff sued to compel the defendant to do so. He won and the defendant

E appeals to us.

No evidence was called for either side at the trial, which proceeded on the basis that there were first two preliminary points of law the determination of which would determine the whole suit. These two points of law were:

- F (1) Did the plaintiff have a cause of action, considering, as the defendant asserted, that he (defendant) was to transfer the portion only after the land had been subdivided and after he had refused to transfer the subdivided part?
- G (2) Could not the defendant be freed from his obligation to subdivide and transfer, simply by paying the plaintiff \$1,200 as provided for in the agreement?

On the first point, the learned judge held that by virtue of section 47 of the Contracts (Malay States) Ordinance, 1950, which reads —

H "Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation. — The question 'what is a reasonable time' is, in each particular case, a question of fact."

I "the engagement to apply for subdivision" must be performed within a reasonable time and considering the time lapse the defendant had failed to do so. The learned judge did not say so in so many words, but it is clear that he thought that the plaintiff had a cause of action because (as the pleadings made obvious) the defendant had failed or refused or neglected to have the land subdivided despite repeated demands by the plaintiff.

On the second point, the learned judge held that section 19 of the Specific Relief (Malay States) Ordinance, 1950, which reads —

“A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.”

was authority for the proposition that the agreement to transfer might be specifically enforced despite the defendant's willingness to make the penalty payment — and the learned judge decided in the circumstances to exercise his discretion in favour of the plaintiff, i.e., to compel the defendant to apply for subdivision and to transfer the subdivision to the plaintiff.

There are two grounds of appeal.

First, Raja Abdul Aziz submits on behalf of the defendant/appellant that the agreement offended against section 37A of the Kelantan Land Enactment which reads —

“(i) From and after the coming into force of this Enactment, except in the case of land situated within the limits of a town or village constituted under this Enactment or any previous land law —

(a) no land which exceeds 250 square depa in area shall by survey be subdivided in such a manner that any of the resulting subdivisional lots shall be less than 250 square depa in area, and

(b)

(c) no transaction shall be registered in respect of any land which would have the effect of creating undivided shares of such size that, if the land were to be subdivided by survey according to the size of such shares, the area of any resulting subdivisional lot would be less than 250 square depa

(ii) His Highness the Sultan may in any particular case by order in writing grant exemption from any of the above provisions and thereupon the land referred to in such order may be divided or such shares in the land created as may be set out in such order and not otherwise.”

and by virtue of paragraphs (a) and (b) of section 24 of the Contracts (Malay States) Ordinance, 1950, which reads —

“The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by law; or

(b) it is of such a nature that, if permitted, it would defeat the provisions of any law;

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

the agreement was void *ab initio* and therefore on the authority of *Savage and Others v. Uwechia*⁽¹⁾ it was impossible to order its specific performance. Referring to section 66 of the Contracts (Malay States) Ordinance, 1950, which reads —

“When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

Raja Abdul Aziz says that the defendant would be happy to pay the plaintiff the money paid under the agreement.

It is common ground that the land concerned exceeds 250 square depa in area and that the portion

A bought by the plaintiff is less than 250 square depa, but I do not agree that the agreement was necessarily void *ab initio*. If the agreement were construed as an undertaking by the defendant to apply for subdivision before the portion is transferred by him to the plaintiff (as was, I think, rightly done by the learned trial judge), then it did not offend against section 37A of the Kelantan Land Enactment — because the prohibition under that section was not absolute. As is pointed out by Mr. Jegathesan for the plaintiff/respondent, the defendant could have applied under subsection (ii) of that section for exemption from the prohibition imposed by subsection (i), and that he never did.

C Next, it is said that if the agreement was not void *ab initio* it has since become void. It is said that in today's circumstances when the National Land Code applies (that Code came into force on 1st January, 1966), it is impossible to subdivide this land, which it is common ground is padi land, because section 136 (1) (f) of the Code provides —

D “No sub-division shall be approved by the State Commissioner or, as the case may be, Collector unless the following conditions are satisfied — ... that the area of any subdivisional portion — ... in the case of land subject to the category ‘agriculture’ or to any condition requiring its use for an agricultural purpose, will not be less than one acre, ...”

and section 57 (2) of the Contracts (Malay States) Ordinance, 1950, provides —

E “A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

Here again I agree with Mr. Jegathesan that the defendant could have applied to the State Authority to have the express condition changed under section 124 (1) (a) of the National Land Code which reads —

F “The proprietor of any alienated land may apply to the State Authority under this section for — ... the removal from [the] document [of title] of the expression ‘padi’, ...”

If the application is granted, then the prohibition of section 136 (1) (f) will cease to apply. Until the defendant has applied and a decision made by the land authority it cannot be said that the act which the defendant contracted to do, has become impossible or unlawful.

G I would therefore dismiss this appeal with costs.

H As regards the order of the learned trial judge enjoining the defendant to subdivide the land pursuant to the agreement (Exhibit P1) and to transfer the portion to the plaintiff, the application for subdivision to be submitted to the Land Office, Kota Bahru, within one week — I would vary it to this extent, that the application for change of express condition and subdivision should be made by the defendant within two weeks of the judgment of this court, and that the plaintiff is to have liberty to apply should the defendant's application be unsuccessful.

Azmi L.P. concurred.

Ali F.J.: This is an appeal from the judgment of the High Court, Kelantan whereby specific performance

was ordered against the appellant in the following terms:

"Defendant to subdivide the land pursuant to the agreement, Ex. P1, and to transfer that portion, referred to in paragraph 5 of the Statement of Claim and in paragraph 2 of the Statement of Defence, in area 60' by 70' abutting the Kota Bharu/Kuala Krai Road to plaintiff; the application for such subdivision to be submitted to the Land Office, Kota Bharu within one week; costs to the plaintiff."

Under an agreement dated 12th December, 1962 written in the Malay language, the appellant agreed to sell and the respondent agreed to purchase a portion of land measuring 60ft wide and 70ft long, at a price of \$400 which has since been paid. It was common ground that pursuant to the agreement and pending the transfer of title, the respondent went into occupation of the portion of land and is still in occupation. There was some doubt as to whether or not the house occupied by the respondent was built by him. This, however, is not material to the issue in the case. Up to the date of the trial, no transfer of title has been made because the land has not been subdivided. By a specially indorsed writ issued on the 27th April, 1964, the respondent sued the appellant on the agreement claiming reliefs as follows:

- (i) Do subdivide the land pursuant to the said agreement;
- (ii) That the defendant do thereafter transfer the said portion to the plaintiff;
- (iii) Further or in the alternative that the defendant do refund the purchase price of \$400.00 to the plaintiff;
- (iv) Compensation where such pecuniary compensation is adequate relief;
- (v) Six per centum per annum interest on the judgment amount from the date of judgment to the date of realisation;
- (vi) Costs."

The appellant in his defence indicated willingness to submit to judgment on the alternative reliefs but resisted the claim for specific performance on the ground as stated in paragraph 5 of the amended statement of defence, which is as follows:

"The plaintiff has no cause of action against the defendant. The cause of action only arises when the land has been duly subdivided and when defendant refuses to transfer the land after such subdivision."

As may be noticed, this is not a direct answer to the plaintiff's case as set out in paragraphs 7, 8 & 9 of the amended statement of claim, which are these:

"7. It is an express condition of the said agreement that the defendant pursuant to the said agreement shall subdivide the said land so that a separate title would be created for that part of the land sold to the plaintiff and thereafter to properly transfer the said portion of the land to the plaintiff.

8. The defendant has failed and/or refused and/or neglected to subdivide the said land despite repeated demands by the plaintiff.

9. The plaintiff has failed and/or refused and/or neglected to make this plaintiff the proper owner of the said portion of land."

As it appears to me, the rival contentions on the pleadings necessarily raised the question whether in terms of clause 2 of the written agreement the defendant's failure to subdivide the land amounts to a breach of contract. Clause 2, as may be observed from the

A English translation of the written agreement, does not expressly make the obligation to subdivide the land, an express condition as was contended by the plaintiff in paragraph 7 of the amended statement of claim. The clause was translated thus:

"2. The first party undertakes to execute transfer unto the second party as soon as the said land is subdivided by the Government, at any Land Office within this State."

B The words "express condition" as used by the plaintiff must be assumed to have been used in the context that the obligation to subdivide the land is an essential term of the contract, the breach of which would amount to a breach of the contract. Thus in terms of the plaintiff's case it was necessary to construe clause 2 of the agreement to ascertain,

C first, whether the obligation to subdivide the land is an implied term of the contract; and

secondly, whether the breach of the implied term amounts to a breach of the contract.

D In this case there is no finding that clause 2 has been so construed.

The trial court's conclusion was arrived at in this way: Upon the plaintiff's counsel's application under Order 25, rule 2 of the Rules of the Supreme Court, the learned trial judge proceeded to consider the defence contention in paragraph 5 of the amended statement of defence on the basis that the failure, refusal or neglect to subdivide the land, which the defendant was deemed to have admitted on the pleadings, was a failure, refusal or neglect to perform the contract within a reasonable time having regard to the period which has lapsed from the date of the agreement. On that ground specific performance was ordered. In my view the failure, refusal or neglect to subdivide the land has not been denied by the defendant in his defence clearly because his contention was that the obligation to subdivide the land is not a contractual obligation. That must be so for otherwise there is no point in saying that the plaintiff's cause of action can only arise after the land has been subdivided. If that be the defence contention, it seems clear, therefore, that on the issue raised in the pleadings it was necessary to arrive at a finding whether in terms of the written agreement the failure to subdivide the land was a breach of the contract. The failure to perform within a reasonable time may constitute a breach of contract if that is the legal consequence contemplated by the parties to the agreement. Section 47 of the Contract (Malay States) Ordinance 1950 referred to in the judgment is not concerned with the legal result of failure to perform within a reasonable time. With respect, I feel compelled to hold that in the absence of any finding based on the true construction of the relevant terms of the written agreement the conclusion of the trial court cannot be upheld.

The trial court has also considered the question whether the defendant could elect to pay the amount stipulated in the agreement in lieu of the obligation to transfer the land. Counsel for the plaintiff has suggested at the trial that this was the only issue for

consideration. That is not correct. The defendant's willingness to submit to judgment on the alternative reliefs is not a defence to the plaintiff's contention that he is entitled to specific performance. However, the learned trial judge in his judgment has referred to section 19 of the Specific Relief (Malay States) Ordinance 1950 as authority for the proposition that despite the defendant's willingness to pay the stipulated amount an agreement to transfer can be specifically enforced. So far as specific performance is an equitable relief it is within the discretionary power of the court to make an order. Section 19 gives the court such power in cases where an order for specific performance can properly be made. But in this case it is necessary to construe clause 3 of the agreement in order to arrive at the conclusion whether in terms of the contract the vendor has the option either to transfer the land or to pay the stipulated amount. Clause 3 reads in these terms:

"3. In the event of the first party refuses to transfer the said land unto the second party after the land has been subdivided by the Government the first party promise to refund the money three times the amount totalling \$1,200/- (Dollars one thousand two hundred)."

If upon the true construction of this clause it can be held that the defendant has the option or choice of either transferring the land or paying the stipulated amount no order for specific performance can properly be made. See *Halsbury's Laws of England*, 3rd Edition, Vol. 36, page 274, paragraph 375. On the other hand if the defendant has no such option the existence of the provisions relating to the payment of the stipulated amount cannot prevent the court from making an order of specific performance. Either way the question is one of construction depending on the precise form of the contract. Here again, there is no finding based on such a construction.

Summarising all that I have said earlier, it would seem to me that inasmuch as there is no definite finding based upon the proper constructions of the relevant terms of the contract, the order for specific performance cannot be justified. I would be inclined to allow this appeal and direct that it be remitted to the High Court for retrial. I realise that this would involve additional costs but justice cannot be done between parties unless a retrial is so ordered.

Before concluding I might mention that in this appeal, quite apart from the ground that the learned trial judge has erred in law in making the order of specific performance (paragraph 1 of the memorandum of appeal), the appellant has also raised the point that the agreement was void *ab initio* or alternatively that it was frustrated by impossibility of performance (paragraph 2 of the memorandum of appeal). The validity of the contract or its frustration has not been raised or argued in the court below as a defence. There is no good reason to justify a new point to be raised or argued on appeal.

I would allow this appeal with costs and order a retrial.

Appeal dismissed. Trial judge's order varied as in last paragraph of Suffian F.J.'s judgment.

Solicitors: Rithaudeen & Aziz; Jega & Co.

HANISAH v. TUAN MAT

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) January 9, 1970]
[Kuala Trengganu — Federal Court Civil Appeal No. X24 of 1968]

Malay Reservations — "Malay" — Meaning of — Certificate of Executive Council — Duty of court to interpret statutes — Kelantan Malay Reservations Enactment, 1930, ss. 12 & 13.

The respondent had obtained a declaration that the transfer of certain land in Kelantan to the appellant was null and void as the appellant was not a Malay. The trial judge had referred the question as to whether the appellant was a Malay or not to the State Executive Council, and the State Secretary in a letter certified that the Executive Council had decided that the appellant was not a Malay. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) the letter from the State Secretary was not binding on the court as it was not a decision of His Highness the Sultan in Council but of the Executive Council;

(2) the respondent had not discharged the onus of satisfying the court that the appellant was not a Malay and not a native of Kelantan.

Cases referred to:-

- (1) *Home v. Lord Camden* (1795), 6 Bro. Parl. Cas. 203; 1 H.B.L. 476; 2 E.R. 1028.
- (2) *Prohibitions Del Roy* (1607), 12 Co. Rep. 63; 77 E.R. 1342.
- (3) *Russell v. Ledsam* (1845), 14 N. & W. 574, 589; 153 E.R. 604.
- (4) *Rahmah binti Ta'at v. Laton binti Malim Sutan* (1927), 6 F.M.S.L.R., 128.

FEDERAL COURT.

Dato' Wan Mustapha bin Haji Ali for the appellant.

Dato' Isahak Hamid for the respondent.

Cur. Adv. Vult.

Suffian F.J.: I am of the opinion that this appeal should be allowed.

The learned judge held that Hanisah (the appellant) is not a Malay and not a native of Kelantan because (1) she made no attempt to support the assertion in her affidavit that she is a Malay and a native of Kelantan by producing a birth certificate, (2) the State Secretary's letter concluded the matter against her, and (3) her affidavit sworn on 18th February, 1967, came too late in view of the State Secretary's letter which had been written on 14th March, 1966.

With respect, the State Secretary's letter did not conclude the matter. The letter reported a decision of the Executive Council, whereas section 13 of the Malay Reservations Enactment says that it is the decision of His Highness the Sultan in Council that "shall